State Responsibility for Residential Racial Discrimination: *The Decline and Fall of California's Proposition 14*

*by Peter J. Donnici**

IN NOVEMBER of 1964, after a bitter and heated campaign, the voters of California adopted Proposition 14 by an overwhelming two-to-one majority. Proposition 14, which became Article I, Section 26 of the California Constitution, provided in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly the right of any person, who is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses.

On May 10, 1966 the California Supreme Court handed down its decisions in seven cases invalidating Article I, Section 26 as a violation of equal protection of laws guaranteed by the Fourteenth Amendment to the United States Constitution. Six of these cases[1] (the leading one of which was *Mulkey v. Reitman)* had concerned Negroes who were refused rental of, or evicted from, premises on the basis of racial considerations. The seventh case[2] was a petition for a writ of mandate challenging the

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[Although the author participated as counsel in a brief challenging the constitutionality of Proposition 14, this article is written as an attempt to objectively appraise problems of state responsibility for residential discrimination.]

[1] Mulkey v. Reitman, 64 Adv.Cal. 557, 50 Cal.Rptr. 881 (1966); Grogan v. Meyer, 64 Adv.Cal. 589, 50 Cal.Rptr. 901 (1966); Prendergast v. Snyder, 64 Adv.Cal. 591, 50 Cal.Rptr. 903 (1966); Peyton v. Barrington Plaza Corp., 64 Adv.Cal. 594, 50 Cal.Rptr. 905 (1966); Hill v. Miller, 64 Adv.Cal. 598, 50 Cal.Rptr. 908 (1966); Thomas v. Goulis, 64 Adv.Cal. 601, 50 Cal.Rptr. 910 (1966). See also: Hill v. Miller, 64 Adv.Cal. 819, 51 Cal.Rptr. 689 (1966). Prior to the enactment of Proposition 14, the California Supreme Court rejected a petition for mandamus to keep the measure off the ballot. The Court felt "that it would be more appropriate to pass on (the constitutional) questions after the election." Lewis v. Jordan, Sac. 7549 (June 3, 1964). There the Court recognized that Proposition 14 presented "grave questions . . . under the Fourteenth Amendment to the United States Constitution," but chose not to interfere, at that point, with the power of the people to propose laws and amendments and to adopt or reject such proposals at the polls.

[2] Redevelopment Agency of the City of Fresno v. Buckman, 64 Adv.Cal. 603, 50 Cal.Rptr. 912 (1966).

constitutionality of Section 26, as applied to property involved in community redevelopment and urban renewal.

In each of the cases, several grounds were urged in opposition to the amendment's validity. It was claimed that Article I, Section 26 was invalid because as an initiative measure it wrongfully related to more than one subject.[3] Moreover, opponents alleged that the provision was a revision[4] of (rather than an amendment to) the State Constitution.[5] Additional issues were raised as to the provision's repugnance to existing federal statutes.[6]

But it was clearly recognized by all parties concerned that the most significant question presented for decision was the validity of Section 26 under the equal protection clause of the Fourteenth Amendment. This was an issue of national, as well as state importance, and the one to which this study will be addressed. Hopefully, from the discussion some insight will be gained regarding the role of the Fourteenth Amendment as a limitation on residential racial discrimination.

THE PURPOSE OF THE FOURTEENTH AMENDMENT

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[7]

When construing the passages of the Fourteenth Amendment for the first time, the United States Supreme Court emphasized that the primary purposes of the provision were to confer citizenship upon the recently

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[3] If true, such would violate the requirements of Article IV, Section 1(c) of the California Constitution:

> Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose.

[4] Opponents of Article I, Section 26 assert that it "revises" Article I, Section 1 (which guarantees the right of all persons to acquire, possess and protect real property), Article I, Section 11 (requiring all laws of a general nature to have uniform application) and Article I, Section 21 (prohibiting class legislation).

[5] Article XVIII of the California Constitution.

[6] 42 U.S.C. §1982 provides that:

> All citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

See also, Oyama v. California, 332 U.S. 633 (1948). The Civil Rights Act, 18 U.S.C. §242 makes it a crime for anyone

> who under color of any law . . . or custom subjects any inhabitant . . . to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color or race.

[7] U.S. Const. amend. XIV, §1.

emancipated members of the Negro race and to prevent the states from discriminatory treatment of them.[8] Protection from racial discrimination was the specific function of the equal protection clause:

> In light of the history of these amendments, and the pervading purpose of them, . . . it is not difficult to give a meaning to this [equal protection] clause. The existence of laws in the states where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.[9]

Most recently, former Justice Goldberg, concurring in *Bell v. Maryland*,[10] has stated:

> The Court has traditionally applied this constitutional standard [of racial equality] to give real meaning to the equal protection clause as the revelation of an enduring constitutional purpose.[11]

STATE ACTION OR PRIVATE ACTION: THE JUDICIAL FUNCTION IN THE SEARCH FOR RESPONSIBILITY

It is clear from the wording of the Fourteenth Amendment that the provision purports to limit only that invidiously discriminatory treatment in which the state is responsibly involved. This "state action" requirement has traditionally been included in the Supreme Court's interpretation of the clauses of the Fourteenth Amendment:

> Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all *state legislation,* and *state action of every kind,* which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property, without due process of law or denies to any of them equal protection of the laws.[12] [Emphasis added]

In the course of its opinion in the landmark *Civil Rights Cases*,[13] the

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[8] Slaughter-House Cases, 16 Wall. 36 (1872).

[9] *Id.* at 81.

[10] 378 U.S. 226 (1963).

[11] *Id.* at 286, 287.

[12] Civil Rights Cases, 109 U.S. 3, 11 (1883).

[13] *Ibid.*

Recently, in United States v. Guest, 383 U.S. —— (1966), a majority of the members of the Supreme Court rejected that portion of the Civil Rights Cases which held that conspiracies by private individuals to deprive other individuals of Fourteenth Amendment rights were not covered by §241 of the Civil Rights Act. Nevertheless, some state involvement (e.g., private individuals preventing the use of *public* facilities) remains necessary for defining or creating a federal right secured by the Fourteenth Amendment. In a concurring opinion (joined by Chief Justice Warren and Mr. Justice Douglas) Mr. Justice Brennan stated:

> For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of §241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right 'secured' by that Amendment. . . .
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> A majority of the members of the Court express the view today that §5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights whether or not state officers . . . are implicated in the conspiracy.

Supreme Court explained the reasoning behind the state action concept:

> The wrongful act of an [private] individual, unsupported by any such [state] authority, is simply a private wrong. . . . If not sanctioned in some way by the state, or not done under state authority, his rights remain in full force and may presumably be vindicated by resort to the laws of the state for redress.[14]

Under this rationale, the Court pointed out, the Fourteenth Amendment would also prohibit wrongful or discriminatory acts committed by private individuals and supported "by state authority in the shape of laws, customs or judicial or executive proceedings."[15]

It is obvious that the Fourteenth Amendment's equal protection clause nullifies state or local *governmental regulations* which *compel* racial discrimination or segregation of private,[16] as well as public[17] facilities. But these cases are of little help to us in evaluating Article I, Section 26 which is free of any language compelling discriminatory residential practices. Indeed, proponents of Section 26 were quick to point out that the provision did nothing more than grant the owner of property the right to sell or lease to whomever he chose. If, in the exercise of this power, the owner engaged in racial discrimination, then such was merely a private act of discrimination, not state action within the meaning of the Fourteenth Amendment.

Any meaningful evaluation of California's new constitutional provision must focus on a consideration of the concept of state action. California's adoption of Section 26 clearly constitutes official "state action." The more important question, however, is whether the provision placed upon the state some responsibility for the private acts of racial discrimination which subsequently occurred.[18] Did Article I, Section 26 merely articulate a neutral state position on the subject of private residential racial discrimination? If so, the discrimination which followed was principally of a private nature and thus outside the prohibitory scope of the Fourteenth Amendment. But if Section 26 had the effect of *authorizing* or *encouraging* (rather than neutrally "permitting") such private dis-

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> Although the Fourteenth Amendment itself . . . "speaks to the State . . ." legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. 383 U.S. at ——, (1966).

See also the concurring opinion of Mr. Justice Clark joined by Mr. Justice Black and Mr. Justice Fortas. Compare: United States v. Price, 383 U.S. —— (1966).

[14] *Id.* at 17.

[15] *Ibid.*

[16] Peterson v. City of Greenville, 373 U.S. 244 (1963).

[17] Shiro v. Bynum, 375 U.S. 395 (1964); Watson v. City of Memphis, 373 U.S. 526 (1963); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[18] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

crimination, then its adoption significantly and responsibly involved the State of California as a participant in the discriminatory activity.

What approach, then, must courts adopt in assessing possible state responsibility for private acts of discrimination? Certainly, they may not expressly reject the "state action" requirement and thereby condemn all private prejudice. But of course, by expansively interpreting the scope of state responsibility, and finding state involvement in every private act, the same result could be achieved. Should the courts be able to indirectly avoid constitutional limitations in the interest of arriving at results which they deem desirable?

Initially it should be recognized that *ad hoc,* result-oriented decision-making must be condemned. Courts are dutybound to develop and articulate objective standards for assessing state responsibility, standards which are applied uniformly, and independently of personal desires concerning the outcome of the particular case.

Professor Wechsler has contended:

> The main constituent of the judicial process is precisely that it must be *genuinely principled,* resting with respect to every step that is involved in reaching judgment on analysis and reasons quite *transcending the immediate result* that is achieved.[19] [Emphasis added]

Professor Wechsler's thesis has been the source of heated controversy regarding the proper role of the United States Supreme Court in formulating Constitutional policy (especially in the area of civil rights).[20] Surely we no longer expect high appellate tribunals to engage in the mere mechanical function of rigidly following precedents. Legal disputes are not decided in a socio-economic vacuum. Judges acquire prejudices and have policy preferences; it is only natural that such preferences become incorporated into some of their decisions.[21]

A certain amount of this flexibility in judicial review is desirable, lest our system grow stagnant. However, in the cases herein considered, some caution may be warranted; for in assessing state responsibility, we are confronted with a problem of the interpretation of federal jurisdiction and authority. Theoretically, no federal issue arises under the Fourteenth

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[19] Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 15 (1959).

[20] See for example Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. of Chi. L. Rev. 661 (1960); Clark and Trubeck, *The Creative Role of the Judge,* 71 Yale L. J. 255 (1961); Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1 (1959); Henkin, *Some Reflections on Current Constitutional Controversy,* 109 U. Pa. L. Rev. 637 (1961); Bickel, *Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40 (1961).

[21] See Rostow, THE SOVEREIGN PREROGATIVE, 7–41 (1962). Also see Donnici, *Protector of Minorities: Mr. Justice Black,* 32 U. Mo. at Kans. City L. Rev. 266, 269 (1964).

Amendment in instances of private racial discrimination unless the state, in any of its manifestations, becomes significantly involved. Such an express constitutional limitation could be important not only in promoting intergovernmental harmony, but in preserving individual freedom from excessive federal supervision and control. We are then faced with a potential conflict between significant constitutional liberties: racial equality versus freedom of individual activity. The Constitution, as the source of our entire federal system, must survive individual contemporary preferences, its provisions must be construed with a view toward long-range community goals and expectations. Result-oriented decisions which are desirable in light of current social, political and economic trends could be the basis for undesirable rulings in the future. Personal *ad hoc* judicial decision making cannot be justified "except (by) those whose legal litmus paper is sensitive to the identity of the litigant rather than the merits of his cause."[22] If the Constitution is to be revised, change should come via the duly established amendatory process, not by judicial fiat.

The late Justice Frankfurter has recognized and eloquently articulated the limitations imposed upon the judicial office:

> We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.[23]

[22] Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1, 4, 33 (1959).

Principled judicial decision-making does not necessarily inhibit judges from formulating standards of interpretation based on personal convictions, so long as these are reasonable in light of the wording, purpose and historical context of the provision involved. However, once these criteria are adopted, they should be followed uniformly and without regard to the identity of the parties or the desirability of the immediate result.

Clearly, a judge may have a genuine and sincere commitment to the principle of freedom of expression, and such would be necessarily reflected in his interpretation of the First Amendment. But if this commitment is "genuinely principled," the freedom will be recognized and liberally interpreted within the context of previously defined legal boundaries and accorded to all groups (subject to these limitations), not merely to groups with which that judge happens to agree. Compare the majority and dissenting opinions in Beauharnais v. Illinois, 343 U.S. 250 (1952). If recent "state action" decisions are open to criticism, then, it is because they have failed to set forth objectively discoverable standards for measuring state responsibility for private arbitrary conduct. This leaves the door open for unpredictable result oriented decision-making in specific findings of state participation in private discrimination against Negroes. Recent cases come dangerously close to resting on a socially desirable immediate result (based upon the identity of the class of parties involved) rather than upon long range objective and uniform considerations of state responsibility.

[23] Rochin v. California, 342 U.S. 165, 172 (1952). Dean Griswold of the Harvard Law

When the California Supreme Court approached the cases herein considered to determine whether Section 26 responsibly involved the State in acts of racial discrimination, it was dutybound to recall the observation of Justice Black that "it *is* a Constitution and it is our duty to bow with respectful submission to its provisions."[24] The California Court was required to search for objective guidelines and standards previously developed by the United States Supreme Court for assessing state responsibility under the Fourteenth Amendment. However, as we shall see, the test established by our highest federal tribunal has been an extremely vague and nebulous one.[25] The test fails to adequately provide the precise and objectively discoverable standards necessary to guide subsequent decisions; this compounds the difficulties of the interpretive function and thereby impedes the task of ascertaining predictable bases for state responsibility.

Thus, it appears that the United States Supreme Court has done very little to limit or discourage *ad hoc,* episodic decision making in this field. It is reasonable to believe then, that in light of the previously demonstrated tendency of the Court to expansively construe the boundaries of federal jurisdictional authority, perhaps the "state action" requirement will meet a fate similar to the "substantial affect on interstate commerce" limitation.[26] Theoretically, federal authority will become operative only to the extent that "state action" is present; but, in fact, state involvement will be found present in nearly every area of private activity. As this broad and plenary interpretation of federal power has been of great social and economic value in the regulation of interstate activity—so might it also provide an excellent federal solution to construing "state

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School has attempted to reconcile the "human element" *vis a vis* the responsibilities in judicial decision-making thusly:

> If decisions are reached on the basis of "absolute convictions" rather than through the painful intellectual effort of judgment in the light of the law, then the judicial process is not in its finest flower. . . . Though it is clear that judges do "make law," and have to do so, it remains the fact that this is, at its best an understanding process, not a means of vindicating "absolute convictions." It is a process requiring great intellectual power, an open and inquiring and resourceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness . . . . When decisions are too . . . result-oriented, the law and the public are not well served. Griswold, *Foreword: Of Time and Attitudes —Professor Hart and Judge Arnold,* 74 Harv. L. Rev. 81, 93–94 (1960).

[24] Bell v. Maryland, 378 U.S. 226, 342 (1964) (dissenting opinion).

[25] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961):

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary . . . [t]o fashion and apply a precise formula for recognition of state responsibility . . . is an "impossible task" which "this court has never attempted" . . . only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

[26] See Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Alanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

action" in dealing with problems of private racial discrimination.[27]

To summarize, then, the judiciary is dutybound to follow and apply explicit constitutional commands and limitations, such as the Fourteenth Amendment's "state action" requirement. This further necessitates the development of objective standards to define the meaning of the provision and to guarantee its uniform application in future decisions. The existence of these guiding standards becomes essential in curbing judicial discretion and discouraging episodic result-oriented decision making. However, it must be recognized that the United States Supreme Court in articulating criteria for application of important constitutional principles, necessarily views problems in light of personal attitudes and relevant political, social and economic considerations. This being the case, it is possible that the Court (or rather a majority of its members) will become convinced that private acts of racial discrimination significantly impede the objectives of the equal protection clause, and that the individual's alleged general freedom to discriminate is of only subsidiary importance. If so, then we should expect the Court's objective criteria for measuring state action to be formulated in such a way as to reach nearly all acts of private as well as public discrimination. That is to say that the uniform standard to be applied would be one which recognized state responsibility for every and any act of racial discrimination. Such a judicial view of "state action" would not necessarily be *unprincipled,* under Professor Wechsler's definition, so long as it was applied uniformly as a basis for recognizing state responsibility for all arbitrary private conduct (racial discrimination, denial of free speech and association, denial of free exercise of religion, taking of property, *etc.)* independent of the identity or socially desirable motivations of the parties involved.

To be sure, I do not herein advocate so broad a judicial approach to the problem of assessing state responsibility for the arbitrary acts of private individuals. I am not firmly convinced that such a view could be applied consistently with guarantees of individual liberty. Comprehen-

[27] The present congressional trend, however, is to ignore the Fourteenth Amendment as a source of affirmative legislative power and deal with the evils of private racial discrimination under its "Commerce" power. See cases, *supra,* note 26. Indeed, in time this search for "state action" and the general problem of testing residential racial discrimination under the Fourteenth Amendment may become moot and superseded by federal legislation banning certain acts of private discrimination which affect interstate commerce. Professor Wechsler has advocated that the more difficult problems of private discrimination be solved in federal and state legislatures "where there is room for drawing lines that courts are not equipped to draw." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 31 (1959). Compare Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1, 16 (1959).

sive regulation of individual conduct truly requires the flexible tools of the legislature rather than the rigidity of judicial constitutional interpretation. And although recent Supreme Court decisions manifest a broader and more expansive view of state responsibility, they have not had the effect of converting all private action into state action. The United States Supreme Court continues to limit the prohibitions of the Fourteenth Amendment to only those cases where the state has become significantly and responsibly involved in the private act of racial discrimination. In applying this standard, several theories of state responsibility have been developed. In the remainder of this study, I will attempt to categorize some of the important relevant judicial decisions according to the various state action theories which they represent. In each instance an attempt will be made to relate the particular theory of state responsibility to the problem of residential racial discrimination (with emphasis on the propriety of the California Supreme Court's use or rejection of such concepts in invalidating Article I, Section 26).

A. "Community Custom" Theory

As mentioned above, the *Civil Rights Cases*[28] which authoritatively limited the operation of the Fourteenth Amendment to "state action" situations, further recognized that the provision would forbid wrongful acts *committed by private individuals and supported by state authority in the shape of laws, customs or judicial or executive proceedings.*[29]

Thus the Supreme Court recognized the powerful and potentially deleterious impact of community custom upon the personal rights of oppressed individuals. Since that time, however, this "custom" principle has been rarely used by the Court. As a result, there is considerable doubt as to the legal-Constitutional importance of such harmful customs.

It is relatively easy to prove the existence of a widespread community custom of residential racial segregation. The custom exists not only on a national scale, according to recent governmental reports,[30] but also in the various communities within the State of California.[31] In a

[28] 109 U.S. 3 (1883).

[29] *Id.* at 17.

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In 1959, the Commission found that "housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay." Today, two years later, the situation is not noticeably better.

[31] U.S. COMM. ON CIVIL RIGHTS, HOUSING REPORT (1961); REPORT OF THE PRESIDENT'S COMM. ON CIVIL RIGHTS: TO SECURE THESE RIGHTS (1947); F.H.A., *Structure and Growth of Residential Neighborhoods in American Cities* (1939). See also, McEntire, RESIDENCE AND RACE (1960).

[31] STATE OF CALIFORNIA WELFARE STUDY COMM. REPORT: THE PATTERN OF DEPENDENT

State Welfare Study Commission report, the concept of the "trap ghetto" was recognized as a real and operating force in California. In this exhaustive study, the Commission found that Negro citizens, as a group, tend to be trapped and concentrated in ghettos, thereby isolated from the rest of the community.[32]

The California Supreme Court has also recognized the impact, the operation and the nature of this custom of residential racial segregation. In *Burks v. Poppy Construction Company,*[33] the Court stated:

> Discrimination in housing leads to a lack of adequate housing for minority groups, and inadequate housing conditions contribute to disease, crime and immorality.

And in *Jackson v. Pasadena City School District:*

> So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to cause antisocial attitudes and behavior.[34]

If it is possible to apply this "custom" rationale to private residential racial discrimination,[35] then Justice Frankfurter's statement in *Terry v. Adams* would be most relevant to the present inquiry: "Long accepted customs and habits may generate 'law' as surely as legislative declaration."[36] And Justice Douglas, concurring in *Garner v. Louisiana,* stated that where

> ". . . *segregation is basic to the structure of the community, the custom that maintains it is as powerful as any law.* If [private individuals] also choose segregation, their preference does not make the action 'private' rather than state action. If it did, a miniscule of private prejudice would convert state into private action."[37] [Emphasis added]

The proponents of California's Article I, Section 26 argued, however, that this state has neither *officially* initiated nor promulgated a policy or custom of racial segregation in housing.[38] Moreover, it must be recog-

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POVERTY IN CALIFORNIA (January, 1964). See also, Kaplan, *Discrimination in California Housing,* 50 Calif. L. Rev. 635 (1962).

[32] *Supra* note 31, at 371–375. See also the affidavit of Earl D. Raab, expert witness (Chief Consultant to the Social and Economic Committee of the California Social Welfare Board) in Thomas v. Gouilas, S.F. Municipal Court Trial No. 477388 (1964).

[33] 57 Cal.2d 463, 471 (1962).

[34] 59 Cal.2d 876, 881 (1963).

[35] And this is doubtful in light of the "custom" factor's prior exclusive use in the context of a discriminatory practice cultivated and promoted by former laws and official regulations. See, for example, Terry v. Adams, 345 U.S. 461 (1953) and Lombard v. Louisiana, 373 U.S. 267 (1963).

[36] *Supra* note 35, at 475.

[37] 368 U.S. 157, 181 (1961) (concurring opinion of Mr. Justice Douglas). Compare Karst and Van Alstyne, *Sit-ins and State Action,* 14 Stan. L. Rev. 762 (1962).

[38] See note 35, *supra.*

nized that Article I, Section 26 did not compel (nor even explicitly encourage) racial discrimination. It is true that private property owners may have practiced discrimination in reliance on the new provision, and as such, Section 26 could have become a device useful for facilitating *private* policies of racial discrimination; but the proponents of the provision regarded it as a merely neutral state stand, and therefore legally irrelevant to the existent community custom of residential discrimination.

In *Mulkey v. Rietman*,[39] the California Supreme Court rejected the notion of community custom as sufficient, *per se* to constitute "state action." The Court felt that the Fourteenth Amendment could not "impose upon the state an obligation to take positive action where it is not otherwise committed to act."[40] In short, the Fourteenth Amendment does not *compel* the states to take affirmative action to relieve and abate a private community custom of racial discrimination.

However, it must be noted that California did not merely refrain from acting thereby leaving private individuals free to pursue their discriminatory policies in a context of state silence on the subject. By the adoption of Section 26, California affirmatively approved a provision which acted upon and *reinforced* the community custom of residential segregation. If, in light of the existence of such a custom, Section 26 was intended to operate so as to necessarily encourage private discriminatory activity, then the provision was a clear example of state action violative of the Fourteenth Amendment. With this in mind, let us examine cases dealing with the importance of motivating legislative intent and purpose.

B. Laws Which Apply to Accomplish or Encourage Racial Discrimination

To examine the issue of Section 26's "neutrality," it is essential to focus upon yet another judicially developed theory of state action under the Fourteenth Amendment. Frequently a state law will appear innocuous on its face. The mere reading of the enactment may reveal no discriminatory purpose or resultant effect whatsoever. Yet when the Court examines the legislative history, the motivating intent, or the ultimate operation of the provision, a harsh and flagrantly unconstitutional discriminatory condition may be uncovered.

In *Yick Wo v. Hopkins*[41] the United States Supreme Court was con-

[39] 64 Adv.Cal. 557, 50 Cal.Rptr. 881 (1966).

[40] *Id.* at 562, 50 Cal. Rptr. at 886. In *Mulkey*, the majority opinion and both dissenting opinions overlooked the importance of the existing community custom of residential racial discrimination. Only upon recognizing the extent and nature of this custom can one appreciate the true purpose and necessary effect of Section 26 in reinforcing and encouraging this practice of *de facto* housing segregation.

[41] 118 U.S. 356 (1886).

fronted with a San Francisco Municipal Ordinance which sought to regulate the local laundry industry. Nothing on the face of the provision would have indicated its harsh anti-Oriental purpose. But, as the Court stated:

> In the present cases we are not obliged to pass upon the validity of the ordinances complained of; for the cases present the ordinances in actual operation and the facts shown establish an administration directed exclusively against a particular class of persons. . . . The discrimination is therefore illegal and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.[42]

Similarly, in *Lane v. Wilson*,[43] a voting regulation which was devoid of any mention of race and appeared on its face to be non-discriminatory was, nevertheless, ruled unconstitutional because its necessary effect was to place onerous burdens on the Negro citizens desiring to exercise their voting franchise. The Court there indicated that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination."[44]

More recently, in *Gomillion v. Lightfoot*,[45] the Court considered an Alabama statute which, on its face, merely changed the boundaries of the city of Tuskegee. Upon closer examination it was determined that the new lines resulted in "removing" nearly 99% of the Negro population from that city; not a single white resident was affected.

In each of the cases discussed above, the United States Supreme Court has not hesitated to look behind so-called "innocuous" or "neutrally worded" statutes in order to glean the true intent and necessary operation of the provisions. Upon finding a discriminatory effect, the Court has held the law repugnant to the Constitution.

The issue for California, then, was: Did Section 26 necessarily operate as a device for preserving or promoting residential segregation of the races? It must be recognized that the California situation differs from that presented in *Yick Wo, Lane* and *Gomillion*. In those cases the controversy involved only the state authority and the victims of the discrimination. In each, the state pronounced a policy and then discriminatorily pursued that policy itself. In California, on the other hand, the State had announced a policy (i.e., freedom of property owners to sell or rent to whom they choose), but in no way compelled or participated in the discriminatory pursuit of the policy.[46] In this respect, proponents of Section 26 compared

[42] *Id.* at 373, 374.

[43] 307 U.S. 268 (1939).

[44] *Id.* at 275.

[45] 364 U.S. 339 (1960).

[46] Of course the state could be involved with the judicial enforcement of the private property-owner's discriminatory practice, but this aspect of state action will be discussed later.

the provision to trespass laws; these, of course, give a property owner the right to decide who may enter upon his premises. It is possible for an owner of property to exercise racial discrimination under the authority of the law of trespass. But, argued the proponents, such discrimination is private and thus outside the ban of the Fourteenth Amendment. Therefore, they would distinguish trespass provisions and Section 26 from laws in which the state itself pursues the discriminatory conduct (such as those in the *Yick Wo, Lane* and *Gomillion* cases).

In *Mulkey,* the California Supreme Court did not adequately consider the "trespass" analogy. However, general trespass laws could have been distinguished from Section 26 by looking to the history surrounding the enactment of the latter and the discriminatory *purpose* which motivated its adoption.[47] The opponents of Section 26 asserted that the provision was enacted to reinforce, implement and promote the existent community custom[48] of residential racial segregation. As such, they argued that the state policy was intended to preserve such segregation, and necessarily resulted in further discrimination by its support and enforcement of the wrongful custom. In this respect, earlier cases concerning official acts which were applied to effectuate private racial discrimination become extremely important in determining whether Section 26 merely "permits" or affirmatively "encourages" the wrongful private conduct.[49] This distinction is not a mere matter of semantics. United States Supreme Court decisions recognize the crucial difference between true state silence (wherein private discrimination is "permitted") and

[47] See the ballot argument favoring adoption of Proposition 14, set out *infra* note 53. In *Mulkey,* the California Supreme Court merely noted that Proposition 14 was enacted against an historical background of anti-discriminatory legislation. 64 Adv.Cal. at 562, 563. Does this mean that once a state enacts anti-discriminatory legislation, the Fourteenth Amendment prohibits its repeal or supersession?

[48] See text accompanying notes 28 through 40, *supra.*

[49] Robinson v. Florida, 378 U.S. 153 (1964); Anderson v. Martin, 375 U.S. 399 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963). These cases, when read together, indicate that even though a state enactment does not compel segregation, the Fourteenth Amendment is violated when the state or its officials affirmatively announce a policy which encourages customary private racial discrimination.

In *Robinson,* a Florida Board of Health regulation required restaurants to provide separate rest room facilities for each race. The Supreme Court recognized this as placing a financial burden on those private restaurants which desired to serve all races. Through this requirement, Florida was guilty of encouraging private racial discrimination.

See also Barrows v. Jackson, 346 U.S. 249 (1953). Permitting damages in an action against seller of property who breached a racially restrictive covenant was held violative of the Fourteenth Amendment. The Court reasoned that if such actions were allowed, private property owners would be *encouraged* to discriminate in the transfer of their property.

affirmative official enactments, racially motivated, which have the purpose of "encouraging" private discrimination.

Prior to examining these cases, however, it is necessary to briefly recall the important historical highlights of housing segregation in California. The existence of the community custom of residential segregation has already been noted. In the face of discriminatory patterns of practice, the California legislature has generally reacted in a most positive manner.[50] The housing field has been no exception.[51] Perhaps the most controversial law in the history of California anti-discrimination legislation has been the Rumford Act.[52] Indeed, it would appear that this legislation (which was specifically addressed to the prevention of residential discrimination and enforced by the State Fair Employment Practice Commission) was the primary target of Article I, Section 26. Of course the wording of Section 26 conferred broader freedom upon the property owner than the mere right to discriminate racially in conveying property interests. The provision would have permitted refusal to sell or rent on the basis of age, sex, marital and family status, hair color or any number of other reasons. But there is no state law restraining discriminatory practices on the grounds mentioned; property owners already have the right to refuse to rent or sell their residences for those reasons. And even if the California Court would have taken this broader view of the rights guaranteed, it is doubtful that proponents of the provision would have been satisfied by a ruling that Section 26, though valid on its face, was unconstitutional whenever applied to the effectuate racial discrimination. Indeed the official ballot argument truly evidenced the racial purposes and considerations which motivated the adoption of Section 26.[53]

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[50] Although states are not dutybound, under the Fourteenth Amendment, to prohibit private racial discrimination, they clearly may enact such regulations (under their general police power) in an attempt to better provide for the general welfare of their inhabitants. Accordingly, many states and local communities have prohibited racially discriminatory practices in housing. Pearl and Turner, *Fair Housing Laws: Halfway Mark,* 54 Geo. L. J. 156 (1965).

In California, racial discrimination has been prohibited in numerous areas of human activity. Klein, *The California Equal Rights Statutes in Practice,* 10 Stan. L. Rev. 253 (1958); Note, *Civil Rights: Extent of California Statutes and Remedies Available for Enforcement,* 30 Calif. L. Rev. 563 (1942).

[51] The Unruh Act, Cal. Civ. Code §§ 51, 52 prohibited "businesses" from practicing racial discrimination in selling or leasing residential property.

[52] Cal. Health and S.C. §§ 35700–35744.

[53] See the State of California Official Ballot, "Argument in Favor of Proposition 14":

> Your "yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.
>
> Most owners of such property in California lost this right through the Rumford Act of 1963. It says

Opponents of Section 26 argued that in viewing the provision in its historical context, its sole purpose and primary effect were to nullify the anti-discrimination policies of the Rumford Act, and to completely reverse the judicially announced general state policy against racial discrimination.[54] To those challenging Section 26 perhaps the greatest evil of the provision was its interdiction of the normal legislative and judicial processes. This disablement of the legislature and the courts was seen as a device to protect and perpetuate the current customary discriminatory practices in housing. As such, the State became an ally, an active party to the "private" discrimination which was practiced under the protection of the new provision.

In *Mulkey,* the California Supreme Court found that Article I, Section 26 *encouraged* racial discrimination.

> The instant case presents [a] . . . situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by

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they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

The Rumford Act established a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

Your "yes" vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another.

Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner must defend himself, not because he refused, but for his reason for refusing. He must defend himself for alleged unlawful thoughts.

A politically appointed commission (Fair Employment Practices Commission) becomes investigator, prosecutor, jury and judge. It may "obtain . . . and utilize the services of all government departments and agencies" against you. It allows hearsay and opinion evidence.

If you cannot prove yourself innocent, you can be forced to accept your accuser as buyer or tenant or pay him up to $500 "damages."

You may appeal to a court, but the judge only reviews the FEPC record. If you don't abide by the decision, you may be jailed for contempt. You are never allowed a jury trial.

If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "yes" vote will prevent such tyranny. It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private parties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation.

Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

Your "yes" vote will end such interference. It will be a vote for freedom.

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[54] James v. Marinship Corp., 25 Cal.2d 721 (1944); Hughes v. Superior Court, 22 Cal.2d 850 (1948), *affirmed,* 339 U.S. 460 (1950); Burks v. Poppy Construction Co., 57 Cal.2d 463 (1962); Jackson v. Pasadena City School Dist., 59 Cal.2d 876 (1963); Abstract Investment Co. v. Hutchinson, 204 Cal. App.2d 309 (1962). Compare Cordova v. Housing Authority of Los Angeles, 130 Cal.App.2d 883 (1955), *cert. denied* 350 U.S. 696 (1955).

> personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has *affirmatively acted to change its existing laws* from a situation wherein the discrimination practiced was legally restricted to one wherein it is *encouraged,* within the meaning of the cited decisions.[55] [Emphasis added]

According to Justice Peek, then, Section 26 was violative of the Fourteenth Amendment because the new enactment (1) changed existing laws by causing the state to retreat from previous anti-discriminatory legislation; and (2) thereby encouraged discriminatory private residential practices. Initially, while the result reached was a desirable one, the analysis raises difficult conceptual problems. The Court appears to be holding that once a state enacts anti-discriminatory legislation, any *repeal* thereof constitutes state action which *encourages* private discrimination.

Such a position seemingly fails to take sufficient account of the fact that, in the field of anti-discriminatory enactments, we are dealing with legislative policy preferences. The state is not constitutionally dutybound to enact such legislation. If such laws are passed, then they may also be repealed (or superseded) to return the state to a position of true neutrality in the realm of private racial discrimination. In dissent, Justice White stated:

> I submit the state cannot fairly be held responsible for [private discriminatory] conduct unless it has a duty under the Fourteenth Amendment to prohibit such conduct.[56]
>
> In an area concerned solely with the rights and obligations of citizens towards each other, the people have a right either directly or through their elected representatives to regulate that kind of conduct or not to regulate it. The adoption of Section 26 . . . evidences the decision of the people not to regulate such conduct in the sale or leasing of private residential property and extends such freedom of action to all persons, unrestricted by racial or religious barriers.[57]

Clearly both opinions contain certain basic Constitutional truths. As Justice White contends, states are not dutybound to take affirmative action to prohibit private residential racial discrimination; the decision to legislate or refrain from legislating is a policy judgment properly left to the people and their representatives. On the other hand, official declarations and enactments which *encourage* private racial discrimination are violative of the Fourteenth Amendment.[58] And this is true even though

[55] Mulkey v. Reitman, 64 Adv.Cal. 557, 570, 50 Cal.Rptr. 881, 890 (1966).

[56] *Id.* at 587, 50 Cal.Rptr. at 900.

[57] *Id.* at 587–588, 50 Cal.Rptr. at 900–901.

[58] See Lombard v. Louisiana, 373 U.S. 267 (1963). In *Mulkey,* 64 Adv.Cal. at 568, 50 Cal.Rptr. at 888, Justice Peek cited other cases in support of this proposition, notably Robinson v. Florida, 378 U.S. 153 (1963) and Barrows v. Jackson, 346 U.S. 249 (1953).

such enactments are worded neutrally or innocuously on their face. In each case, the Courts must pierce the verbal veil of the enactment and examine its purpose and necessary effect.

Here Justice Peek recognized the relevance and significance of *Anderson v. Martin.*[59] A Louisiana law required all political candidates to designate their race on nomination papers and ballots. The United States Supreme Court recognized that the regulation applied to all candidates of all races and that the law in no way expressly compelled or advised racial discrimination. Nevertheless viewing the *purpose* of the regulation in light of a previously established *tradition* and community *custom* of racial inequality, the Court invalidated the law as officially encouraging private discrimination by voters in violation of equal protection of laws. In light of *Anderson,* how should the California Supreme Court have approached the issue of whether Section 26 was a *neutral* policy preference against anti-discriminatory legislation (such as repeal of legislation would have been) or, an *encouragement* of private racial discrimination?

In *Anderson,* the state, in compelling a racial label to be placed on the candidate at a crucial moment in the electoral process, indicated to its voters that race was an important factor in making a political choice. Under such circumstances the state was guilty of influencing and encouraging the private citizen to cast his vote along racial lines. It is true that the Louisiana requirement involved in *Anderson* can be superficially distinguished from Section 26 in that it *explicitly* required a racial designation. This clearly underscores the racial purpose of the provision. However, the mere fact that the word "race" does not expressly appear in the phraseology of Section 26 does not decisively negate its racial purpose. It has been seen that the motivating intent behind the California provision was to establish and reinforce the right of the property owner to transfer his interest along racial lines. Even though private individuals may vote for political candidates on the basis of racial consideration and (in the absence of contrary legislation) alienate property on the basis of racial considerations—the Fourteenth Amendment prohibits states from affirmatively enacting laws which encourage such racial choices. California's Section 26 was an unconstitutional exercise of state authority in that it inevitably encouraged racial residential discrimination. As the United States Supreme Court stated in *Anderson v. Martin,* such a provision must be invalidated under the equal protection clause because

[59] 375 U.S. 399 (1964).

> In light of 'private attitudes and pressures' towards Negroes at the time of its enactment could only result in that 'repressive effect' which was brought to bear only after the exercise of governmental power.[60]

Unfortunately, in *Mulkey v. Reitman,* the California Supreme Court majority merely assumed that the provision encouraged private discrimination, while the dissenters just as summarily concluded that Section 26 was neutral.[61] None of the opinions undertook an in-depth analysis of the provision. It is submitted that had such an inquiry been conducted, appraisal of Section 26 in light of its purpose and necessary operational effect would reveal that the enactment pronounced an affirmative official policy which clearly encouraged, promoted and reinforced the established community custom of *de facto* residential racial segregation.

C. The "Affirmative Duty" Cases

Proponents of Section 26 had asserted that the provision is completely

[60] *Id.* at 403, citing Bates v. Little Rock, 361 U.S. 516, 524 (1960) and N.A.A.C.P. v. Alabama, 357 U.S. 449, 463 (1958).

See also Lombard v. Louisiana, 373 U.S. 267 (1963). There the city of New Orleans had been the scene of widespread sit-in demonstrations protesting private segregation in eating establishments. City officials, fearing public violence, publicly pleaded with the demonstrators for an end to the sit-in activity. The United States Supreme Court viewed such statements as lending the coercive force of the state to the private custom of segregation of restaurant facilities. Hence, even neutrally worded official pronouncements may be held denials of equal protection, where they combine with a deeply entrenched custom to encourage private discriminatory conduct.

[61] Mulkey v. Reitman, 64 Adv.Cal. 557, 570; 50 Cal.Rptr. 881, 890 (1966). Compare dissenting opinion of Justice White, 64 Adv.Cal. at 574–576; 50 Cal. Rptr. at 891–893; and the dissenting opinion of Justice McComb, 64 Adv.Cal. at 582; 50 Cal.Rptr. at 901.

The United States Supreme Court has also had difficulty in characterizing neutrally worded enactments under this "permit-encourage" distinction. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) Mr. Justice Stewart's concurring opinion seized upon a statute which allowed private restaurants to refuse service to anyone whose presence was deemed offensive to the majority of customers. Stewart stated: "The highest court in Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." 365 U.S. at 726–727.

However, Justices Frankfurter, Harlan and Whittaker disagreed with Mr. Justice Stewart's premise that the statute had been construed as "authorizing" racial discrimination. They believed it just as reasonable to characterize the statute as codifying the common law rule of official neutrality regarding private racial discrimination. 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter); 365 U.S. at 729 (dissenting opinion of Mr. Justice Harlan joined by Mr. Justice Whittaker). See also Turner v. City of Memphis, 369 U.S. 350 (1962) cited by the California Supreme Court in Mulkey v. Reitman, 64 Adv.Cal. 557, 570, 50 Cal.Rptr. 881, 889 (1966).

cf. Opinion No. 59–95, 34 Ops. Cal. Atty. Gen. 1, 2–3:

> While state action which only incidentally and passively benefits private persons engaging in racial discrimination, i.e., the furnishing of police and fire protection, is not prohibited, the tenor of the recent decisions is to the effect that state action which actively encourages and fosters racial discrimination by private persons is unconstitutional.

neutral on the matter of residential racial discrimination. They had contended that under the Fourteenth Amendment the state has no affirmative duty to legislate against segregation, hence the Federal Constitution was not violated by a State provision articulating a policy of official silence. So viewed, Section 26 merely restored to the property owner a quantum of freedom which could or could not have been exercised discriminatorily.

For the moment then, let us assume *arguendo* that Section 26 is merely a "neutral" provision rather than one which affirmatively reinforces an existent community custom in such a manner as to encourage private racial discrimination. In such a case, we must take into account that line of decisions which has recognized a kind of affirmative duty in the state to protect against racial segregation privately perpetrated. The issue here relevant is: Even if Section 26 stated a mere neutral policy of silence regarding residential discrimination, did California violate the Fourteenth Amendment by disabling itself from fulfilling an affirmative duty to prohibit racial discrimination in the field of housing?

Many of these "affirmative duty" cases arise in the context of public (or quasi-public) functions which the state has authorized private individuals or organizations to perform. For example, in *Smith v. Allwright,*[62] the United States Supreme Court was confronted with a situation in which the State of Texas had permitted the Democratic Party of Texas (a private organization) to conduct its own primary elections. Inasmuch as Negroes were privately excluded from membership in the Party, they were unable to participate in the primary.[63] The Court held that in view of the state's delegation of authority to the private organization, the discriminatory action of the private group was under color of state authority and thus unconstitutional under the Fifteenth Amendment.[64]

Ultimately, in *Terry v. Adams,*[65] the Court prohibited a practice whereby the all white "Jaybird Association" held informal (i.e., not state controlled) "caucuses" and endorsed candidates for the Democratic

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[62] 321 U.S. 649 (1944).

[63] The Court noted that the candidate winning the Democratic Party primary was almost always assured of attaining office. Hence the Negroes were excluded from the principal phase of the electoral process. *Id.* at 659–666.

[64] The Fifteenth Amendment is also addressed to "state action" rather than private action. Dean Pollak has observed that in the light of the evil to be prohibited by the Fifteenth Amendment (discrimination in voting) and the importance of the voting franchise perhaps a more lenient standard of state involvement is warranted. Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1, 23 (1959).

[65] 345 U.S. 461 (1953).

Party nomination.[66] In finding unconstitutional state action, Justice Black stated:

> For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment.[67]

In the *Jaybird* case, Justice Frankfurter took the opportunity to elaborate upon the "state action" concept. His concurring opinion is most explicit:

> This phrase [state action] gives rise to a false direction in that it implies some impressive machinery or deliberate conduct normally associated with what orators call a sovereign state. *The vital requirement is State responsibility*—that somewhere, somehow, to some extent there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.[68] [Emphasis added]

Therefore, even though a private discriminatory activity was involved, the Constitution was violated. This means that under the circumstances, it was not enough for the state to remain neutral. Instead the state was dutybound to guard against private discrimination. However, the voting cases must be read in light of the important quasi-public function which the private organization controlled; no general affirmative duty for the state to guard against all kinds of private racial discrimination can be honestly read into these cases.[69]

Also, consider the 1946 decision, *Marsh v. Alabama*.[70] There, the activities of a privately owned "company town" were held to constitute "state action" under the Fourteenth Amendment. Again in this case it was important to the Court that the private facilities were built primarily for the benefit of the public; the operation was essentially a public function subject to state regulation. Under the recent *Griffin*[71] case (where the county abdicated its responsibility for maintaining schools,

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[66] Again, Justice Black noted that, with few exceptions, Jaybird candidates had won without opposition in the Democratic primaries. *Id.* at 463.

[67] *Id.* at 469.

[68] *Id.* at 473.

[69] This is especially emphasized in the concurring opinion of Chief Justice Vinson and Justices Clark, Reed and Jackson, *Id.* at 477, 482–484.

See also United States v. Reese, 92 U.S. 214 (1875); Nixon v. Condon, 286 U.S. 73 (1932); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

[70] 326 U.S. 501 (1946).

[71] Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964).

Interestingly enough, the United States Supreme Court has refused to review cases which seek to compel public school districts to take affirmative steps to relieve *de facto* racial segregation. Bell v. School, City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1964), *cert. denied,* 377 U.S. 924 (1964); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964). Compare Branche v. Board of Education, 204 F.Supp. 150 (E.D.N.Y. 1962).

deferring instead to private schools which engaged in racial discrimination), it was made clear that the state cannot avoid the responsibility for discrimination in quasi-public activities merely by delegating the power to perform these functions to private agencies.

It seems apparent that these "quasi-public function" cases have little persuasive weight in creating a constitutional duty in the State of California to affirmatively prohibit racial discrimination in the transfer of private property.[72]

Yet, in *Mulkey,* the California Supreme Court expressly applied the cases of *Smith v. Allwright, Terry v. Adams* and *Marsh v. Alabama.*[73] Justice Peek especially relied on the recent United States Supreme Court decision in *Evans v. Newton,* as a "similar abdication of a traditional governmental function" (maintenance of a park) for the purpose of permitting private discrimination.[74] In his use of these precedents, Justice Peek stated:

> Those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function.[75]

This position seems to ignore the clear language of *Evans v. Newton* which recognized that the governmental *nature* of the activity being carried out *is* of primary concern.[76] Indeed, it is the governmental nature of the function which creates the state responsibility for the private discriminatory conduct which transpires.

However, another line of affirmative duty cases may be of more interest. If the state undertakes an obligation to regulate a given activity (even of a non-governmental nature) it is then dutybound to guard against occurrences of private racial discrimination therein.[77] At this

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[72] The so-called "public custody" cases seem equally inapplicable for similar reasons. These cases merely recognize an affirmative duty to protect the Fourteenth Amendment rights of individuals in custody. Catlette v. United States, 132 F.2d 902 (5th Cir. 1951); Lynch v. United States, 189 F.2d 476 (4th Cir. 1963), *cert. denied* 342 U.S. 831 (1963); Williams v. United States, 341 U.S. 97 (1951).

[73] 64 Adv.Cal. at 567, 568; 50 Cal.Rptr. at 887, 888.

[74] 382 U.S. 296 (1966).

In *Evans,* heavily relied upon by the California Supreme Court in *Mulkey,* the United States Supreme Court held the Fourteenth Amendment to forbid private control and racial discrimination of a Macon, Georgia park; the tradition of municipal control had become too firmly established. Compare Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964) and Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); *In re* Girard College Trusteeship, 391 Pa. 434; 138 A.2d 844, *cert. denied,* 357 U.S. 570 (1958).

[75] 64 Adv.Cal. at 568; 50 Cal.Rptr. at 888.

[76] 382 U.S. 296 at —— (1966).

[77] As early as 1944, in Steele v. Louisville N.R.R., 323 U.S. 192 (1944), which concerned

point, the opponents of Section 26 could possibly have argued that the right to own and transfer property exists only by virtue of the laws of the state,[78] for as Chief Justice Traynor has observed, legal rights are realities "only when enforceable."[79] Under this theory, perhaps the Fourteenth Amendment would prohibit California from enacting a provision (such as Section 26) which *permits* the discriminatory operation of its laws governing transfer of residential property. As mentioned above, however, such a position would certainly be stretching the "affirmative duty" theory beyond all prior limits. In *Mulkey*, the California court specifically rejected this approach to assessing state responsibility.

> The parties generally concede that in an organized and regulated society the state or its subdivisions play some part in most, if not all, so-called private transactions, . . . that many of the rights and duties arising out of the transfer of an interest in real property are related to or dependent upon the state or local governments. But it is not the mere fact that in some manner the state is involved, however remotely, with which we are concerned. *It is only where the state is significantly involved* that the prohibitions of the equal protection clause are invoked.[80] [Emphasis added]

This statement by the Court makes its reliance on the "affirmative duty" cases even more perplexing and unacceptable.

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racial discrimination by a private labor union, Justice Murphy stated in his concurring opinion:

> The Constitutional problem inherent in this instance is clear. . . . While such a union is essentially a private organization, its power to represent and bind all members of a class is derived solely from Congress [which could not] authorize the representative to act so as to ignore the rights guaranteed by the Constitution. 323 U.S. at 208.

Cf. N.L.R.B. v. Pacific American Association, 218 F.2d 913, 917 (9th Cir. 1955).

Moreover, in the public utility cases where state law *permits* privately owned transportation companies to make rules regarding seating of passengers, and pursuant to this authorization the private companies practice racial discrimination—such is tantamount to "state action" repugnant to the Fourteenth Amendment. Bowman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); McCabe v. Atcheson, T. & S.F. Ry., 235 US. 151 (1914). And where the discriminator is operating with financial assistance from a governmental agency, the Constitution is violated. Simkins v. Moses H. Cone, 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938.

According to the California Supreme Court, the unconstitutionality of Article I, Section 26 is even closer as applied to private property which is publicly financed. "The 'state action' which was evident in *Mulkey* without this facet of state participation is thus even more positively identified in the instant case." Peyton v. Barrington Plaza Corp., 64 Adv.Cal. 594, 596; 50 Cal.Rptr. 905, 907 (1966); Redevelopment Agency of City of Fresno v. Buckman, 64 Adv.Cal. 603; 50 Cal.Rptr. 912 (1966); *cf.* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 399 U.S. 981 (1950).

In all of these cases, the state is so responsibly involved in the private activity that the discrimination is viewed as though it had occurred in the context of a publicly operated function or a publicly owned facility.

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[78] Powell, *Property Rights and Civil Rights,* 15 Hastings L.J. 135 (1963); Lathrop, *Racial Covenant Cases,* 1948 Wis. L. Rev. 508, 515 (1948).

[79] Traynor, *Law and Social Change,* 1956 U. Ill. L. Forum 230, 238 (1956).

[80] 64 Adv.Cal. at 564; 50 Cal.Rptr. at 886.

D. The "Judicial Enforcement" Theory: Shelley v. Kraemer Revisited. In 1948, the United States Supreme Court announced its decision in *Shelley v. Kraemer*[81] holding that the judicial enforcement of a racially restrictive covenant was state action repugnant to the Fourteenth Amendment.[82] The *Shelley* case has been the source of much controversy regarding the state action requirement.[83] On one extreme, the case is interpreted to mean that *any* judicial enforcement of privately perpetuated racial discrimination is sufficient to constitute state action within the meaning of the Fourteenth Amendment:

> The *law* of contracts is not a matter of private agreement. The *agreements* entered may be classified as *private* affairs. However, when resort is had to a state court seeking enforcement for breach of such an agreement, it is the *law* of contracts which then must be invoked. . . . *Agreements* may reside in the sphere of private acts; their enforcement by a court invades the domain of sovereign action and must partake of the Constitutional limitations affixed thereto.[84]

And Professor Henkin has stated:

> Private persons may discriminate. . . . But if the state lends the support of its institutions to enforce the discrimination, the state is responsible; without the state's aid, the discrimination would not be effective. State effectuation of private discrimination, state encouragement of private discrimination, perhaps even state toleration of private discrimination are possible grounds for holding the state responsible for discrimination enforced by its courts. If the state is responsible, it is violating the equal protection clause.[85]

Other commentators wisely observe that to interpret *Shelley* to mean that any judicial enforcement of private discrimination is unconstitutional "state action," would be the first step in converting all private action into state action.[86] Regardless of how beneficial such an extension would

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[81] 334 U.S. 1 (1948).

[82] In Buchanan v. Warley, 245 U.S. 60 (1917), the Supreme Court invalidated a city zoning ordinance which compelled racial segregation in housing. See also Harmon v. Tyler, 273 U.S. 668 (1926); City of Richmond v. Deans, 281 U.S. 704 (1930). In *Shelley,* the Court indicated that a racial zoning situation could not be legally accomplished by use of judicially enforced racial covenants any more than it could by use of racial zoning laws. See also Hurd v. Hodge, 334 U.S. 24 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953). In the latter case, the *Shelley* rationale was applied to bar an action for damages between co-covenantors for breach of a racially restrictive covenant.

[83] The legal periodical commentary has been plentiful. See, for example, McGovney, *Racial Residential Segregation,* 33 Calif. L. Rev. 5 (1945); Lathrop, *The Racial Covenant Cases,* 1948 Wis. L. Rev. 508 (1948); Ming, *Racial Restrictions and the Fourteenth Amendment,* 16 U. of Chi. L. Rev. 203 (1949); Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1 (1959); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962) and other articles too numerous to set out.

[84] Scanlon, *Racial Restrictions in Real Estate,* 24 Notre Dame Law. 157, 172–3 (1949).

[85] Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473, 486 (1962).

[86] Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1 (1959); 44 Calif. L. Rev. 718 (1956).

appear in the light of the current socio-political awareness of the importance of equal civil rights—that interpretation would change the whole character of the Fourteenth Amendment. The original and indeed the continuing purpose of the Fourteenth Amendment was and is to circumscribe the arbitrary power of state governments. It was not addressed to private action because under the Federal Constitution, individuals are at liberty to act arbitrarily in this regard. To apply the Fourteenth Amendment to cover nearly all aspects of private activity is tantamount to a change in the meaning of the provision. If this is to be done, then traditional amendatory processes should be followed. But as the law now stands, Professor Paul Kauper has noted, "The Constitution is concerned with constitutional liberties in the classic sense of the Western world, i.e., as liberties of the individual to be safeguarded against the power of the state."[87]

What construction, then, should be given our "rule in *Shelley's* case"? To answer this question, perhaps the words of Chief Justice Vinson's opinion for the Court are most appropriate. The Chief Justice first noted the importance of the individual property right involved:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property. . . . 'All citizens of the United States shall have the same right, in every State . . . , as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property'.[88]

Chief Justice Vinson then turned to the problem of "state action," noting that a racial zoning regulation "could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance."[89]

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[87] Kauper, CIVIL LIBERTIES AND THE CONSTITUTION 129 (1962). This argument, however, has far less significance in a case such as is presented by Section 26, where the State Constitution seems to interdict and paralyze the state legislative processes which would otherwise be available for defining private relationships regarding residential racial discrimination. Of course, Section 26 itself could be regarded as a kind of "legislative" or "political" choice on the issue.

[88] Shelley v. Kraemer, 334 U.S. 1, 10–11 (1948), citing U.S.C. §1982; see also Cal. Const. Art. I, §1: "All men . . . have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." Can Article I, Section 26 be read as amending Article I, Section 1 to mean that all citizens have a right to acquire and possess property except as modified by the discretionary racial choices of the property owner? If so, perhaps this could be another argument against the validity of Section 26. Compare Kauper, CIVIL LIBERTIES AND THE CONSTITUTION 142–146 (1962). But, of course, this again relates to the central and crucial issue of whether or not Section 26 is a "neutral" provision.

[89] Shelley v. Kraemer, *supra* at 11, citing Buchanan v. Warley, 245 U.S. 60 (1917).

> But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate are determined . . . by the terms of agreements among private individuals. Participation of the state consists in the enforcement of the restrictions so defined. . . . [T]he action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[90]

It is at this point that the Court adopted a restricted approach to the judicial state action concept. After concluding that the racial covenants themselves and any voluntary adherence thereto would not be regarded as violative of the Fourteenth Amendment, the Court elaborated on the specific act of judicial enforcement that had occurred:

> . . . [T]he petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. *It is clear that but for the active intervention of the state courts,* supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
>
> These are not cases . . . in which the states have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather these are cases in which the states have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights *in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.*[91] [Emphasis added]

Thus, California's Section 26 can be read as being outside of the *Shelley* rule in that it does not compel discrimination on the part of "willing" buyers and "willing" sellers of property.[92] Indeed, proponents of Section 26 argued that the provision does no more than (in Chief Justice Vinson's words) leave "private individuals free to impose such discriminations as they see fit."

In *Mulkey,* however, Justice Peek (in his opinion for the majority of the Court) drew liberally from the language of *Shelley,* and apparently ignored the limitations which Chief Justice Vinson attached to that ruling. The California Court relied upon *Shelley v. Kraemer* as conclusive authority for the proposition that "when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved."[93]

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[90] Shelley v. Kraemer, *supra* at 12–13.

[91] *Id.* at 19.

[92] Pollak, *Racial Discrimination and Judicial Integrity,* 108 U. Pa. L. Rev. 1, 12–18 (1959).

[93] Mulkey v. Reitman, 64 Adv.Cal. 557 at 566; 50 Cal.Rptr. 881 at 887 (1966).

In so holding, the California Supreme Court approved of an earlier lower court decision in *Abstract Investment Co. v. Hutchinson:*[94]

> In applying the *Shelley* reasoning that the process of the court cannot be utilized to accomplish a private discrimination, it has been held reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the tenant was admittedly in default (citing the *Abstract Investment Co.* case).
>
> The instant case [*Mulkey*] may be distinguished from the *Shelley* and *Abstract* cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate.[95]

The crucial distinctions in *Mulkey* which failed to impress the California Court were, in fact, the *decisive* differences for the United States Supreme Court in its ruling in *Shelley v. Kraemer.* In adopting so unrestricted a view of *Shelley,* the California Supreme Court seems to have effectively abolished the "state action" requirement and turned its back on the reasonable interpretation of *Shelley.* But even this is uncertain. For subsequently, in *Hill v. Miller,*[96] the California Court refused to apply the *Shelley* and *Abstract Investment* rulings to a case in which a Negro tenant was evicted on the basis of racial considerations.

Clearly Justice White's dissent in *Mulkey* is more direct and far less confusing regarding the role of judicial enforcement under the Fourteenth Amendment:

> Neither case [*Shelley* nor *Barrows v. Jackson*[97]] supports the proposi-

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[94] 204 Cal.App.2d 242; 22 Cal.Rptr. 309 (1962). The opinion in this case was written by then District Court of Appeal Justice Louis Burke (now Associate Justice of the California Supreme Court). But compare Hill v. Miller, 64 Adv.Cal. 819, 821, 822; 51 Cal.Rptr. 689, 690 (1966).

[95] 64 Adv.Cal. at 566; 50 Cal.Rptr. at 887.

[96] 64 Adv.Cal. 819; 51 Cal.Rptr. 689 (1966). The court permitted the eviction of a Negro tenant even though the landlord's act was based solely on racial considerations. The landlord, of course, could not rely on the invalidated Article I, Section 26, but nevertheless could privately discriminate. "The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination." 64 Adv.Cal. at 821, 51 Cal.Rptr. at 690. The Court noted that neither the Rumford nor the Unruh anti-discrimination statutes were applicable to the present case and expressly, but unsatisfactorily, distinguished the *Abstract Investment* case. 64 Adv.Cal. at 821–822, 51 Cal.Rptr. at 690. Compare text accompanying notes 94 and 95, *supra.* In dissenting from *Mulkey,* Mr. Justice White clearly noted the importance of the fact that *Shelley* involved a *willing* Caucasian seller and a *willing* Negro buyer. Under those circumstances the transfer could not be enjoined by a judicially enforced racially restrictive covenant [citing Mr. Justice Black's opinion in Bell v. Maryland, 378 U.S. 226, 330–331 (1964)]. 64 Adv. Cal. at 579–580, 50 Cal. Rptr. at 895–896.

[97] 346 U.S. 249 (1953). In my opinion, *Barrows* would have been even better persuasive authority than *Shelley.* There, the United States Supreme Court held that a judicial award

> tion that a state court would have been under a constitutional mandate to compel an owner to sell to a Negro if he preferred to adhere voluntarily to his restrictive agreement.[98]

The mere act of petitioning for judicial relief should not be sufficient to convert private discrimination into "state action." For as Dean Pollak has observed, states should be able to enforce private prejudice without becoming significantly responsible for, or a joint participant in the discrimination. It is only when the courts (or any governmental institution) *compel* or *affirmatively encourage* private parties to discriminate against their present will (by enforcing prior agreements) that state responsibility is present within the meaning of the Fourteenth Amendment.[99]

Admitting the inapplicability of *Shelley*, however, would not preclude a finding of Section 26's unconstitutionality. Even though *Shelley* does not prevent the judicial enforcement of "purely private discrimination," the Fourteenth Amendment does prohibit the affirmative enactment and enforcement of provisions which encourage such private discrimination. In adopting Section 26 against a customary background of housing segregation, California has affirmatively announced its approval of residential discrimination, and its willingness to enforce and thereby "encourage" (within the meaning of *Barrows)*.

ASSESSING STATE RESPONSIBILITY: THE RECENT CASES

As stated earlier the United States Supreme Court has refused to articulate a specific and well-defined test for determining the quality of state participation in private discrimination necessary to invoke the strictures of the Fourteenth Amendment. Instead the Court proceeds espisodically, evaluating each case on its own fact. Thus, in *Burton v. Wilmington Parking Authority*[100] Justice Clark re-affirmed that "private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its mani-

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of damages against a former property owner (who had sold to a Negro in violation of a racially restrictive covenant) constituted discriminatory state action. The Court recognized that the damage award neither prevented nor discouraged the specific transfer of property to the particular Negro buyer involved (who was already in possession of that property). However, "the result of that sanction by the State would be to encourage the use of restrictive covenants" and to indirectly "coerce" future sellers to abide by such discriminatory agreements whether they wanted to or not. 346 U.S. at 254.

[98] 64 Adv.Cal. at 584; 50 Cal.Rptr. at 898.

[99] Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. Pa. L. Rev. 1, 12–18 (1959). Compare Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 292 (1954); *vacated* 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

[100] 365 U.S. 715 (1961).

festations has been found to have become involved in it."[101] But in evaluating "state involvement," Justice Clark observed:

> Because the virtue of the right to equal protection of the laws could be only in the breadth of its application, its Constitutional assurance was reserved in *terms whose imprecision was necessary* if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, *to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task'* which 'This Court has never attempted' . . . *Only by sifting facts and weighing circumstances* can the nonobvious involvement of the State in private conduct be attributed its true significance.[102] [Emphasis added]

The *Burton* case concerned racial discrimination by a private restaurant which was located within an off-street building owned and operated by the Wilmington Parking Authority (an agency of the State of Delaware). The privately owned restaurant claimed to be acting in a purely private capacity under its lease. The Supreme Court disagreed. In finding state involvement in the private discrimination, the Court seized upon many factual circumstances present: the land and building were publicly owned; the building was dedicated to "public uses" in the Authority's performance of "essential government functions"; the privately leased areas constituted an integral and indispensable part of the State's plan to operate its parking project as a self-sustaining unit; the State was responsible for maintenance of the entire building; the parking facility and the restaurant enjoyed a variety of mutual benefits (*e.g.*, customers of one often used the facilities of the other); profits earned by the restaurant's discriminatory business operation contributed to the financial success of the governmental agency.[103]

The sum total of all of these elements convinced the Court that "the degree of state participation and involvement in the discriminatory action" was the type which the Fourteenth Amendment was designed to condemn.[104]

> The State has so far insinuated itself into a position of interdependence with [the private restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.[105]

The vague "responsibility" test promulgated in *Burton* makes it very difficult to objectively appraise the validity of Section 26. Nevertheless,

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[101] *Id.* at 722.

[102] *Id.* at 722.

[103] *Id.* at 723–725.

[104] *Id.* at 724.

[105] *Id.* at 725. The Court here reiterates its requirement for a case by case consideration of state responsibility; not every private tenant of the state will be affected. *Id.* at 725–726.

the California Supreme Court treated the problem as a relatively easy one to solve. Seizing upon the broad language of *Burton,* Justice Peek asserted that Section 26 significantly involved California in acts of private racial discrimination because it had the effect of encouraging such discrimination.[106] In fact the *Burton* case, as decided by the United States Supreme Court majority, is in no way relevant or factually analogous to *Mulkey*. The *Burton* Court's bases for finding state participation and "significant involvement," set out above, are in no way comparable to problems of state responsibility under Section 26.

Perhaps realizing this, Justice Peek turned for support to Mr. Justice Stewart's concurring opinion in *Burton* which focused upon a state enactment allowing private restaurants "to refuse to serve persons whose reception . . . would be offensive to the major part of his customers." According to Justice Stewart, this statute was violative of the Fourteenth Amendment "as authorizing discriminatory classification based exclusively on color."[107] Justice Stewart's position is clearly relevant to the question of the validity of Section 26. However, as Justices Frankfurter,[108] Harlan and Whittaker[109] point out, it suffers from the same defect as the *Mulkey* decision: it *assumes,* without proof or sufficient underlying support, that the innocuously and neutrally worded statute "authorizes" or "encourages" private discrimination. As stated earlier, the Fourteenth Amendment clearly prohibits official enactments "encouraging" private discrimination, but no Supreme Court decision has precluded the states from articulating neutral positions, which would merely "permit" such activity. (Otherwise trespass laws would be unconstitutional when invoked by an owner of a private residence to exclude others from his property on the basis of racial or religious considerations.) I reiterate that the distinction between laws encouraging or authorizing racial prejudice as opposed to laws which merely *permit* such private prejudice can be meaningfully drawn only after an exhaustive and comprehensive examination of the purpose and necessary effect of the provision's operation. Neither Mr. Justice Stewart (in *Burton)* nor Justice Peek (in *Mulkey)* undertook such an inquiry. Only if we view Section 26 as having the purpose and necessary effect of reinforcing the firmly entrenched community custom of residential segregation can we justifiably hold the State of California as an ally and joint participant in the private acts of racial discrimination which occurred.

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[106] Mulkey v. Reitman, 64 Adv.Cal. 557, 564-565; 50 Cal.Rptr. 881, 886 (1966).

[107] 365 U.S. at 726–727, cited in Mulkey, 64 Adv.Cal. at 569; 50 Cal.Rptr. at 889.

[108] 365 U.S. at 727–728 (dissenting opinion).

[109] 365 U.S. at 728–730 (dissenting opinion).

The recent case of *Evans v. Newton*[110] was also strongly relied upon by the majority opinion in *Mulkey*. In *Evans* the United States Supreme Court ruled that where a city had been trustee of a private park under circumstances whereby the tradition of municipal control had become firmly established, the proposed substitution of private trustees would not preclude the application of the Fourteenth Amendment's ban against racial discrimination. Mr. Justice Douglas, in his opinion for the Court explicitly emphasized that the finding of state responsibility was ". . . buttressed by the nature of the service rendered the community." In *Evans,* the private park (for a number of reasons) assumed the character which was "municipal in nature."[111] Hence, the California Supreme Court's reliance on *Evans* seems misplaced. The quality and quantity of state participation in the two cases is significantly different.

Again in the use of *Evans* as persuasive authority, the California Supreme Court found supporting language in a concurring opinion; this time that of Mr. Justice White.[112] White noted that state laws which made it possible for a settlor to establish a racially discriminatory trust neither coerced nor expressly encouraged such discrimination. Nevertheless, Justice White felt that the state could be responsible for unconstitutionally encouraging private racial restrictions. However, Mr. Justice White did not merely assume that all state laws which allow private discrimination *per se* encourage the invidious activity. His position was more guarded and reasonable. Mr. Justice White felt that Georgia law generally prohibited restrictions in all charitable dedications to the public except for restrictions based on race. As such the case was "viewed as one where the State had forbidden all private discrimination except racial discrimination."[113] Hence, the enactment's racial purpose was uncovered and the provision could fairly be characterized as encouraging or authorizing private discrimination.

This problem of distinguishing state "neutrality" from state "encouragement" in the private racial discrimination area has been one that has greatly troubled the United States Supreme Court. I have alluded to the dispute in *Burton,* between concurring Justice Stewart's position and the opposing views of dissenting Justices Harlan, Frankfurter and

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[110] 382 U.S. 296 (1966).

[111] *Id.* at ——.

[112] Discussed in Mulkey v. Reitman, 64 Adv.Cal. at 570–571; 50 Cal.Rptr. at 890.

[113] 382 U.S. at ——. Although, on its face, Article I, Section 26 of the California Constitution confers broader freedom ,the purpose and true operational effect primarily guarantees the right of the property owner to refuse to sell or rent on the basis of racial considerations. See note 53, *supra.*

Whittaker. In *Evans* Justice White's concurrence was very guarded. The Court opinions in *Anderson v. Martin*[114] and *Lombard v. Louisiana*[115] found state encouragement only after a clear showing that the neutrally worded requirement (patently based on racial considerations) in the former and official declarations in the latter had the intended purpose and effect of reinforcing an existent well-established community custom of private discrimination.

Perhaps the most problematic area of assessing state neutrality or responsibility, however, has been that of state enforcement of trespass laws. In *Bell v. Maryland*,[116] Negro "sit-in" demonstrators were convicted of violating the State criminal trespass law in refusing to leave a private restaurant which denied service to Negroes. The important constitutional issue presented was whether the State's enforcement of its trespass law to effectuate the discriminatory practices of the private restaurant constituted "state involvement" in the discrimination repugnant to the Fourteenth Amendment. The Court avoided deciding the Constitutional issue,[117] much to the consternation of six of the members of the Court who were anxious to reach a decision on the merits. Chief Justice Warren, Justice Douglas,[118] and Justice Goldberg[119] felt that there was sufficient state action to render the discrimination unconstitutional.

Dissenting Justices Black, Harlan and White rejected the notion of state responsibility for the discrimination involved.[120] Mr. Justice Black refused to accept *Shelley v. Kraemer*[121] as establishing a principle that all "judicially enforced" discrimination was state action. Justice Black found that the essence of the *Shelley* decision was that the State had compelled discrimination even though the private parties immediately involved did not wish to discriminate.[122] As Justice Black stated:

> Section 1 of the Fourteenth Amendment, standing alone, does not pro-

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[114] 375 U.S. 399 (1964).

[115] 373 U.S. 267 (1963).

[116] 378 U.S. 226 (1964).

[117] The Court remanded the case to the Maryland Court of Appeals to determine the effect of a supervening change in the state law (enactment of a Public Accommodations law). *Id.* at 241–242.

[118] *Id.* at 242 (concurring opinion of Mr. Justice Douglas joined by Mr. Justice Goldberg).

[119] *Id.* at 286 (concurring opinion of Mr. Justice Goldberg joined by Chief Justice Warren and Mr. Justice Douglas).

[120] *Id.* at 318 (dissenting opinion of Mr. Justice Black, joined by Mr. Justice Harlan and Mr. Justice White).

[121] 334 U.S. 1 (1948).

[122] Bell v. Maryland, 378 U.S. at 328–332.

hibit privately owned restaurants from choosing their own customers.[123]

In *Mulkey*, it was argued that if private restaurant owners may use neutral trespass laws (and the state's criminal law enforcement machinery) to effectuate their private racial discrimination, private property owners should have a similar power under Article I, Section 26.

But, consider *Griffin v. Maryland*.[124] There, a private amusement park implementing its policy of racial discrimination, employed a private policeman who incidentally happened to be a deputy sheriff. In holding the acts of the employee to be state action, the Court stated:

> If an individual is possessed of State authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity.[125]

And further:

> [T]o the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the state is charged with racial discrimination and violates the Fourteenth Amendment.[126]

Opponents of Section 26 used the *Griffin* language to show that even though the Fourteenth Amendment could not reach "purely private" housing discrimination, it does prohibit property owners who are "possessed of state authority" (Section 26) ". . . and purport to act under that authority," from engaging in racial discrimination. Inasmuch as Section 26 protects and insulates those who so discriminate, opponents of the provision argued that the State has "undertaken an obligation to enforce a private policy of racial segregation."

In *Griffin*, Justices Harlan, Black and White again dissented:

> It seems clear . . . that the involment of the State is no different from what it would have been had the arrests been made by a regular policeman dispatched from police headquarters. I believe, therefore, that this case is controlled by the principles discussed in Mr. Justice Black's opinion in *Bell v. Maryland*.[127]

In his opinion for the Court, however, Chief Justice Warren distinguished the "regular policeman" case by showing that the employee here was a deputy sheriff specifically "under contract to protect and enforce the racial segregation policy" of the private park.[128]

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[123] *Id.* at 343.

[124] 378 U.S. 130 (1964).

[125] *Id.* at 135, citing Screws v. United States, 325 U.S. 91 (1945) and Williams v. United States, 341 U.S. 97 (1951) both of which concerned wrongful acts of law enforcement officers. Perhaps, then, the *Griffin* decision must be limited to facts involving the activity of an official agent of the government.

[126] *Id.* at 136, citing Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[127] *Id.* at 138 (dissenting opinion of Mr. Justice Harlan, joined by Mr. Justice Black and Mr. Justice White).

[128] *Id.* at 137.

The issue for the California Court in assessing the validity of Section 26, then, could have been framed as follows: Was the provision like general trespass laws, a neutral statement of policy concerning property rights (here, free alienation of property interests)? Or, was it a specific grant of state authority with the purpose and necessary operational effect of promoting, authorizing and encouraging the prior custom of private residential racial discrimination? In this context, *Mulkey v. Reitman* could have been viewed as truly presenting a case of first impresssion. In fact, no clear authority existed which would have been precisely or decisively in point. Instead, however, the California Court elected to mold the *Mulkey* case to fit the rationale and language of *Burton, Shelley v. Kraemer* and *Evans v. Newton.* In drawing liberally from the language of these cases, the Court neglected the significant factual and conceptual differences which distinguish those cases from *Mulkey.* In each of the United States Supreme Court cases cited by the California Court, the state participation in and responsibility for the private acts of racial discrimination was far more significant and authoritative.

"Principled" decision-making would have warranted the ascertainment and articulation of specific judicial standards and guidelines regarding the nature and extent of the state's participation in the particular acts of private discrimination. In *Mulkey,* however, the California Supreme Court could only generalize regarding state responsibility. The Court did not closely analyze and scrutinize the purpose and necessary operational effect of Section 26 in light of an existing widespread community custom of residential segregation. In the absence of this more comprehensive examination of the conditions surrounding the adoption and application of the provision, the Court's finding that Section 26 "authorizes" and "encourages" discrimination appears conclusionary, a mere assumption. The Court seems to acknowledge that the state has no duty to affirmatively prohibit private discrimination; yet it implies that once a state does enact such legislation, any official affirmative retreat therefrom necessarily constitutes state action "encouraging" private discrimination.[129]

[129] Compare Henkin, *Shelley v. Kraemer:Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473, 483 (1962):

> The voting cases have suggested . . . that the state continues to be responsible for discrimination where it once sought to regulate private activity and later seeks to disengage itself. . . . If a state continues to be responsible after it repeals invalid discriminatory regulation . . . it would seem responsible, *a fortiori* when it repeals state legislation in order to make it "lawful" for private persons to discriminate.

But can such an analysis be applied to Section 26, which did not deal with private activity in a qausi-public function, in the absence of certain and specific proof of the purpose and effect of that provision? *Cf.* Hill v. Miller, 64 Adv.Cal. 819, 51 Cal.Rptr. 689 (1966).

Perhaps, ultimately, the United States Supreme Court will broadly expand the concept of "state action." Perhaps the Court will extend the "affirmative duty" cases, *Shelley v. Kraemer, Evans v. Newton* and *Griffin v. Maryland* to recognize that all private racial discrimination occurs in a context of state participation; that states, through permissiveness, inaction and omission, are therefore significantly responsible for all private discrimination. But, the Court has not authoritatively developed such an approach as of yet. A realistic inquiry into the qualitative nature and quantitative extent of the states' involvement in the act of private bias is still required. "Principled" decision-making demands a comprehensive and disciplined factual analysis of each case, not a mere repetition of nebulous generalizations regarding the significance of state participation.

Unfortunately, the California Supreme Court's unrestricted reading of the "affirmative duty—public function" cases and *Shelley v. Kraemer* could lead to the abolition of the state action—private action distinction. Any private individual who is the victim of racially discriminatory treatment perpetrated by another private individual need only file suit for affirmative judicial relief in order to "make a federal case out of it." For if the state Court refuses relief, it becomes a participant in the discrimination. The commands of the equal protection clause may then apply to prohibit all private, as well as public, acts of racial discrimination except on those rare occasions where the "defense" of freedom from compelled association might be appropriate. In the latter case, the Court will be forced to balance important associational freedoms against the prohibition on the particular act of private racial discrimination.

Therefore, while a decision condemning private racial discrimination is both appealing and desirable from a result-oriented point of view, we must ask whether the ultimate abolition of the Fourteenth Amendment's "state action" requirement could cause greater problems. Does preservation of a realistic concept of state action serve any important societal purpose?

Mr. Justice Harlan has stated:

> This [state action] limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a *clash of competing constitutional claims of a high order: liberty and equality.* Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in

> the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.[130] [Emphasis added]

The United States Supreme Court continues to expressly recognize the need for significant and responsible state participation as a prerequisite for applying the prohibitions of the Fourteenth Amendment to private acts of racial discrimination. Unless and until the Court rejects this notion and broadly expands the sphere of state responsibility, lower courts and legal commentators must observe and intelligently analyze allegations of "state action" or state participation in private acts of racial discrimination. Judicial decisions dealing with such problems must be based upon objective (rather than result-oriented) considerations. In order to meaningfully distinguish permissive, neutral state laws from those that encourage private discrimination, courts must undertake an in-depth and comprehensive examination of the provision, its purpose, application and operation in light of community environment, expectations and practices. To be "generally principled," decisions must not look merely to the wording of an innocuously and neutrally phrased enactment and simply conclude, without underlying factual support, that the provision *does* or *does not* encourage private bias. For in so approaching this important problem, courts could too easily subvert the true policy of the Fourteenth Amendment. An overly narrow view of state responsibility could result in judicial affirmation of publicly encouraged racial discrimination; an overly expansive interpretation could convert all private discrimination into state action. Either extreme would seem to conflict with the clear meaning and purpose of the Fourteenth Amendment and its equal protection clause. In this area of law, desirable results and personal predilections, whether bigoted or enlightened should not control judicial decision making. Mr. Justice Black has cautioned us to "remember that it is a Constitution and that it is our duty 'to bow with respectful submission to its provisions'."

> Our duty is simply to interpret the Constitution and in doing so the test of constitutionality is not whether a law is offensive to our conscience or to the 'good old common law', but whether it is offensive to the Constitution.[131]

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[130] Peterson v. City of Greenville, 373 U.S. 244, 249–250 (1963) (concurring opinion), cited by Mr. Justice White in dissenting from the *Mulkey* decision, 64 Adv.Cal. at 578; 50 Cal.Rptr. at 894–895.

[131] Bell v. Maryland, 378 U.S. 226, 341–342 (1964) (dissenting opinion), citing Cohens v. Virginia, 6 Wheat. 264, 377 (1821).

CONCLUSION

The result reached by the California Supreme Court in *Mulkey v. Reitman* was the correct one. Article I, Section 26 of the California Constitution was state action violative of the equal protection clause of the Fourteenth Amendment. For the constitutional lawyer, however, this conclusion must not be based upon the mere desirability of the immediate result (i.e., condemnation of private racial discrimination). To be principled the decision must incisively appraise the true nature of the state's participation in the specific acts of private discrimination. Platitudes and eloquent rhetoric cannot substitute for analytical application of uniform, objective standards for measuring state responsibility.

It is not enough to summarily invalidate official enactments as violative of the Fourteenth Amendment and then support this conclusion with the quotation of language and citation of precedents of questionable relevance. *Smith v. Allwright, Shelley v. Kraemer, Burton v. Wilmington Parking Authority* and *Evans v. Newton,* in spite of the generally noble language they contain, are not factually similar to the California residential segregation problem and should not have been used by the *Mulkey* court as controlling authority. *Mulkey* simply did not involve the type of state participation found in any of those cases. The result in *Mulkey* is constitutionally sound on a narrower basis. Article I, Section 26 violates equal protection because it was an affirmative enactment which reinforced a community custom of residential segregation.

This does not mean that all private racial discrimination necessarily violates the Fourteenth Amendment. The California Supreme Court has recently recognized this.[132] Private discrimination which occurs in the context of true state *silence* violates no federal right of the victim of the discriminatory treatment. But Article I, Section 26 of the California Constitution could not be considered the equivalent of state silence. It was an official enactment (clear state action) which affirmatively sanctioned acts of private racial discrimination in the alienation of residential property. In light of the prior tradition and custom of residential *de facto* segregation, and the clear racial purpose which motivated the adoption of the provision,[133] Section 26 operated so as to necessarily encourage discriminatory practices. The property owners' decision whether to discriminate or not to discriminate, then, was made against a background of an *official endorsement* of the *customary community pressures* which encourage residential segregation.

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[132] Hill v. Miller, 64 Adv.Cal. 819, 51 Cal.Rptr. 689 (1966).

[133] See note 53 and accompanying text, *supra.*

Therefore, I can agree that the Fourteenth Amendment is not violated by purely private discriminatory choices made in the context of true state silence and neutrality on the matter; equal protection of laws is denied, however, by state pronouncements (even though innocuous on their face) which operate to affirmatively encourage and endorse the private discriminatory practice.